

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a production worker full time beginning January 26, 1998 through September 21, 2005 when he was discharged. The claimant was discharged for violating the employer's sexual harassment policy for the third time. The claimant was previously disciplined for violating the employer's sexual harassment policy in September 2002, November 2002 and December 2003. In December 2003 the claimant was warned that any future related unacceptable sexual comments to coworkers or any other violation of the harassment policy would be grounds for immediate discharge.

On September 14 Linda West complained that in the last month the claimant had been sexually harassing her by telling her in part that he dreamed of her having sex with four other men and that she "handled them really well." On another occasion the claimant asked Ms. West if she liked to wrestle. On another separate occasion the claimant indicated that he believed the embroidered design on her t-shirt was in all the right places. Ms. West also complained that the claimant was pulling on her frock coat. Ms. West did not ask the claimant to help her take off her frock coat.

After the claimant reported his 'dream' to Ms. West she reported it to another coworker and told that coworker how much it bothered her that he made sexual comments to her. When the employer investigated Ms. West's complaint the coworker confirmed that Ms. West had complained to her about the claimant's 'dream' in the previous month. When the claimant's wife, who is also an employee, learned of the claimant's 'dream' the claimant alleged that Ms. West had in fact reported to him that it was her dream. The claimant's version of events is not supported by other coworker's testimony.

Another coworker had complained directly to the claimant that he crossed the line when discussing with her watching a stud horse breed a mare and that it had given him a "big hard on." The claimant admits that he made the comments to Cameo Gherkin in May 2005.

The claimant and his wife both admitted at hearing that in the employer's break room they would discuss their sex life. The claimant had been trained on the employer's sexual harassment policy and what comments were prohibited. Other employees confirmed during the employer's investigation that the claimant and his wife made sexual comments while in the break room.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant had been disciplined previously for violating the sexual harassment policy. Ms. West reported the claimant's 'dream' to another coworker almost one month before complaining to management about the claimant's conduct. That coworker, Mary Ohlert, supported Ms. West's version of events. Additionally, the claimant admits making an inappropriate comment to Cameo Gherkin in May 2005. Finally, the claimant admits discussing his and his wife's sex life in the employer's break room. The claimant received fair warning that the employer was no longer going to tolerate his performance and conduct. The claimant knew that he needed to refrain from sexual comments in the work place in order to preserve his employment. The claimant's comments to Ms. West, Ms. Gherkin and his discussions in the company break room constitute disqualifying misconduct. Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be

credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The October 7, 2005, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$886.00.

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